

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833
(916) 274-5721
FAX (916) 274-5743
www.dir.ca.gov/oshsb



THIRD NOTICE OF PROPOSED MODIFICATIONS TO
CALIFORNIA CODE OF REGULATIONS

TITLE 8: Division 1, Chapter 4, Subchapter 7, Article 10, New Section 3380.1
of the General Industry Safety Orders

Employer Duty to Pay for Personal Safety Devices and Safeguards

Pursuant to Government Code Section 11346.8(c), the Occupational Safety and Health Standards Board (Standards Board) gives notice of the opportunity to submit written comments on the above-named standard in which further modifications are being considered.

The standard was modified as a result of comments in response to the 15-Day Notice of Proposed Modifications mailed on February 16, 2011. On March 16, 2011, a Second 15-Day Notice of Proposed Modifications was mailed.

Written comments were submitted in response to the Second 15-Day Notice of Proposed Modifications mailed on March 16, 2011, and further modifications have been made.

A copy of the full text of the standard, with the modifications clearly indicated, is attached for your information.

Pursuant to Government Code Section 11346.8(d), notice is also given of the opportunity to submit comments concerning the addition to the rulemaking file of the following documents relied upon:

FURTHER ADDITIONAL DOCUMENTS RELIED UPON

1. *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979), 25 Cal. 3d 465
2. *Oakland Peace Officers Association v. City of Oakland* (1973), 30 Cal. App. 3d 96
3. The Occupational Safety and Health Appeals Board (OSHAB) Decision after Reconsideration in *Southern California Edison* (1985), Docket No. 81-R4D4-663
4. The OSHAB Administrative Law Judge decision in *Labor Ready Southwest, Inc.* (2001), Docket No. 01-R1D1-002
5. *California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002), 96 Cal. App. 4th 824

These documents are available for review during normal business hours at the Standards Board Office located at the address listed below.

Any written comments on these modifications must be received by 5:00 p.m. on September 29, 2011, at the Occupational Safety and Health Standards Board's Office, 2520 Venture Oaks Way, Suite 350, Sacramento, California 95833 or submitted by fax to (916) 274-5743 or e-mailed to oshsb@dir.ca.gov. This proposal will be scheduled for adoption at a future Business Meeting of the Occupational Safety and Health Standards Board.

The Standards Board's rulemaking file on the proposed action is open to public inspection Monday through Friday, from 8:00 a.m. to 4:30 p.m. at the Standards Board's Office. Inquiries concerning the proposed changes may be directed to Marley Hart, Executive Officer at (916) 274-5721.

OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD

Date September 9, 2011

Marley Hart, Executive Officer

Further Modifications to the Original Proposal

PROPOSED MODIFICATIONS
(Regulatory language to be deleted is shown in strike-out.)

STANDARDS PRESENTATION
TO
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

Attachment No. 1

Page 1 of 1

PROPOSED STATE STANDARD,
TITLE 8, DIVISION 1, CHAPTER 4

Amend Article 10 to add new Section 3380.1 to read:

§ 3380.1. Employer Duty to Pay for Personal Safety Devices and Safeguards.

Whenever any safety order in Division 1 of Title 8 requires the provision, furnishing, use or wearing of any safety device and/or safeguard, it shall mean that the safety device and/or safeguard shall be provided at no cost to the employee.

Exceptions:

- 1. ~~Non-specialty safety toe-protective footwear (including steel-toe shoes or steel toe boots) and non-specialty prescription safety eyewear when the employer permits such items to be worn off the job site.~~**
- 2. ~~Metatarsal guards when shoes or boots with built-in metatarsal protection is provided by the employee and used with the employer's permission.~~**
- 3. ~~Logging Boots (calked boots or lug-soled boots) when required by Section 6254 of the Logging and Sawmill Safety Orders.~~**
- 4. ~~Everyday clothing such as long-sleeve shirts, long pants, street shoes, normal work boots, ordinary clothing, skin creams, or other items used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, ordinary sunglasses, and sunscreen.~~**
- 5. ~~Personal protective equipment and safeguards that are intentionally damaged or lost by the employee.~~**
- 6. ~~Where an employee provides adequate protective equipment he or she owns Employee-provided protective equipment pursuant to and which meets the requirements of Section 3380(d) of these Orders. the employer may allow the employee to use it and is not required to reimburse the employee for that equipment. The employer shall not require an employee to provide or pay for his/her own PPE, unless the PPE is excluded by exceptions 1-5.~~**

Note: Authority cited: Section 142.3, Labor Code. Reference: Section 142.3, Labor Code.

SUMMARY AND RESPONSE TO COMMENTS

SUMMARY AND RESPONSE TO WRITTEN COMMENTS

I. Written Comments

Van A. Howell, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated March 21, 2011.

Comment:

The modification resulting from the second 15-Day Notice appears to be commensurate with federal regulation.

Response:

The Board thanks Mr. Howell for his comment.

Corey N. Friedman, Staff Attorney, Worksafe, Inc., by letter dated March 29, 2011.

Comment:

The addition of exceptions to the employer's duty to pay for personal protective equipment (PPE) is contrary to Labor Code Sections 6401 and 6403, as well as related case law, notably, *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979), 25 Cal. 3d 465. Consequently, the proposal, because of the exceptions, fails to meet the "consistency" criterion applicable to regulatory proposals. In addition, some of the proposed exceptions are flawed in specific respects (i.e., Exception 1 creates a loophole that would enable employers to evade the duty to pay for PPE; Exception 4 is unnecessary insofar as it addresses everyday clothes, and insofar as Exception 4 pertains to foul weather clothing, it would require employees in certain occupations to provide PPE that clearly is needed for their protection; Exceptions 5 and 6 are unclear).

Response:

The Board disagrees that it is precluded as a matter of law from adopting reasonable exceptions to the employer's duty to pay for PPE. The *Bendix* decision and other legal authority cited by Mr. Friedman address controversies other than the scope of the Board's rulemaking authority in this area. The court in *Bendix* leaves the door open to at least one possible exception (shifting the duty to pay for PPE to employees pursuant to collective bargaining agreements). Labor Code Sections 6401 and 6403 include the concept of reasonableness, and the law disfavors absurd results, which is an indication that reasonable exceptions may be legally permissible, especially when they negate absurd results. In addition, at least one court has said words to the effect that Labor Code Sections 6401 and 6403 should not be applied in a literal, unbending manner (see *California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002), 96 Cal. App. 4th 824).

Consider, for example, the exception for everyday street clothing. Mr. Friedman says that the exception is not needed because "No one considers an everyday outfit to be safety equipment."

Yet, a literal reading of Labor Code Sections 6401 and 6403 could lead to a contrary, albeit absurd, conclusion. Thus, an exception addressing everyday street clothing may well be desirable and legally permissible.

Nonetheless, Mr. Friedman's comments and others summarized below show that there is far from a consensus among stakeholders regarding the efficacy of exceptions in general and the proposed exceptions in particular. The Board's customary approach to rulemaking is to build consensus wherever possible and, wherever possible, to avoid precipitous changes in the status quo without giving thorough consideration to the concerns of stakeholders. Based on these factors, the Board will again amend the proposal, this time deleting the exceptions. Before exceptions to the employer's duty to pay for PPE are again considered (if they are again considered), the Board anticipates that an advisory committee will be convened or that some other appropriate means will be utilized by Board staff to give thorough consideration to the arguments of the proponents and opponents of possible exceptions. The fact that two prior 15-Day Notices have been needed in order to draft and refine the possible exceptions is a further indication that the possible exceptions would benefit from further consideration.

This course of action does not impact employers negatively. Proceeding with the proposal minus the exceptions will add clarity to an arguably murky area of the law, but it will not alter the status quo. Even though there is no specific California occupational safety and health standard regarding the employer's duty to pay for PPE, when the issue has arisen, employers have had to pay for PPE without any exception, as illustrated by such decisions as *Oakland Peace Officers Association v. City of Oakland* (1973), 30 Cal. App. 3d 96; *Bendix*; the Occupational Safety and Health Appeals Board (OSHAB) Decision after Reconsideration in *Southern California Edison* (1985), Docket No. 81-R4D4-663; and the OSHAB Administrative Law Judge decision in *Labor Ready Southwest, Inc.* (2001), Docket No. 01-R1D1-002.

Sheheryar Kaoosji, Project Coordinator, Warehouse Workers United, by letter dated March 31, 2010.

Comment:

The addition of exceptions to the employer's duty to pay for PPE is contrary to California law.

Response:

See the response to Mr. Friedman's comment.

Michael Meuter and Anne Katten, California Rural Legal Assistance Foundation, Inc., by letter dated April 1, 2011.

Comment:

This comment is essentially the same as Mr. Friedman's comment.

Response:

See the response to Mr. Friedman's comment.

Jeremy Smith, Deputy Legislative Director, State Buildings and Trades Council of California, by letter dated April 1, 2011.

Comment:

This comment is essentially the same as Sheheryar Kaoosji's comment.

Response:

See the responses to Sheheryar Kaoosji's and Mr. Friedman's comments.